FIFTH DIVISION
September 13, 2013

No. 1-12-0155



---

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of Cook County |
| Plaintiff-Appellee, | ) | |
| | ) | |
| v. | ) | 04 CR 3121 |
| | ) | |
| PHILLIP HARTSFIELD, | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Nicholas Ford, |
| | ) | Judge Presiding. |

---

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court did not err in the second-stage dismissal of defendant's postconviction petition.

¶ 2 Defendant Phillip Hartsfield appeals from the trial court's dismissal of his amended postconviction petition at the second stage of postconviction proceedings. On appeal, defendant argues that he made a substantial showing that (1) his trial attorney was ineffective by usurping his constitutional right to testify on his own behalf; (2) his trial attorney was ineffective for failing to call a defense witness to contradict testimony from one of the State's witnesses; (3) his

trial attorney and appellate counsel were ineffective for failing to challenge portions of a witness's testimony about inculpatory statements made by a codefendant; and (4) his postconviction counsel failed to provide a reasonable level of assistance when he abandoned a claim made in defendant's *pro se* postconviction petition.

¶ 3 Defendant was indicted for the January 2004 first degree murder and home invasion of Alejandro Martinez and a jury trial was conducted in March 2005. Defendant was tried simultaneously before separate juries with codefendant Mohammed Abukhdeir. Abukhdeir was found not guilty. As this is defendant's second appeal, we will discuss only those facts relevant to defendant's postconviction petition. A more detailed discussion of defendant's trial can be found in his direct appeal. *People v. Hartsfield*, No. 1-05-2782 (March 28, 2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 In the early morning hours of January 4, 2004, Martinez was hosting several friends at his house, located at 5530 South Kolin in Chicago. Claudia Garcia was invited to the party by her boyfriend Steven Howard and arrived at the party around 3 a.m. with Candy Richmond and Kristina Kasper. Martinez, Howard, Raul Flores and Hector Canternin were already present.

¶ 5 During the party, Garcia and Howard went into the bathroom. Kasper borrowed Richmond's phone to call defendant, with whom she was having a sexual relationship. During the call, Kasper became angry because she heard defendant with another woman. After she hung up, Kasper told Richmond about the conversation and an argument broke out between Kasper, Richmond, Flores and Canternin after the men asked why Kasper was dating "a black guy." Richmond knocked on the bathroom door and told Garcia that she wanted to leave. As the

women were leaving, Richmond and Kasper continued to yell at the men at the party. Howard followed the women to the car. Richmond and Kasper testified that Howard struck them as they were getting in Garcia's car. They left around 4:30 or 5 a.m.

¶ 6 While in the car, Richmond and Kasper made several phone calls. Garcia testified that Richmond called someone and gave them the address of the party and threatened to have someone killed. Garcia also stated that someone from the party called Richmond and Richmond said she "got" them. Kasper testified that either she or Richmond called defendant and gave them the address. Richmond denied that she threatened to have someone at the party killed or that she "got" them. Garcia dropped the women off at their houses and went home. Both Richmond and Kasper had been drinking that night.

¶ 7 Defendant picked up Richmond and Kasper around 7 a.m. in a four-door silver car with Abukhdeir in the car and they proceeded to Martinez's house. Defendant and Abukhdeir knocked on Martinez's front door, but there was no answer. They returned to the car and opened the trunk. Richmond testified that she saw a silver automatic handgun in defendant's hand. Defendant and Abukhdeir went down a gangway adjacent to the house. They returned approximately five minutes later.

¶ 8 Richmond testified that she heard Abukhdeir say that "he has blood all over him." Richmond thought she saw blood on Abukhdeir's knuckles. She stated that defendant told Abukhdeir to "shut the f*** up." Abukhdeir then said, "If it wasn't for me, you wouldn't have gotten through the back door." She also heard Abukhdeir say, "I hope you did it right." Kasper testified that she did not hear this conversation. Richmond further testified that defendant

stopped the car at one point and took the gun from Abukhdeir and put it in the trunk. Later, they stopped at another house. Defendant opened the trunk and Abukhdeir went inside the house and then returned to the car. Defendant dropped off Kasper and then Richmond. Richmond stated that when he dropped her off, defendant told her that "you're my girl but I'll kill you." Richmond asked defendant what he had done and defendant responded, "nothing."

¶ 9 Katherine Chrzan testified that in January 2004, she was pregnant with defendant's child and she drove a silver four-door Chevrolet. At around 4:30 a.m. on January 4, 2004, defendant picked up Chrzan from a friend's house in her car. Abukhdeir was in the car. Defendant received a phone call and Chrzan heard a female voice. Defendant told the caller he would be there in 20 minutes. Defendant drove to his house. Chrzan and defendant went into his bedroom and he retrieved a shotgun. Defendant left the house around 6:30 or 7 a.m. Chrzan stayed at defendant's house. Defendant returned around 9 a.m. and they slept until 6 p.m.

¶ 10 When Chrzan got in her car that evening, she noticed the gas gauge was near empty. She asked defendant where he went and he said he had gone to Chicago. Chrzan stated that defendant said that if he told her what happened, she "wouldn't want to come around anymore" and that "if he ever went to jail for murder, he would kill himself." She testified that defendant was on the phone that night and at one point she heard him ask if "Sally" was registered. She understood "Sally" to be a gun. Later, on January 6, 2004, she was with defendant when they were approached by police outside the courthouse in Maywood. She consented to the search of her car.

¶ 11 John Waszak testified that on January 6, 2004, Abukhdeir gave him a knotted sock and

inside the sock, he felt a gun barrel and shell casings. Waszak's girlfriend drove him to the Ogden Bridge over the Des Plaines River in Lyons and he threw the sock in the river. Before he disposed of the sock, he looked inside and saw a gray .40 caliber gun barrel, spent casings, and shells. He recognized the gun as one he called "Sally" and he had sold to Abukhdeir. Waszak admitted that he numerous prior convictions, including forgery, residential burglary, domestic battery and possession of a controlled substance.

¶ 12 Laura Vega, Martinez's aunt, testified that she lived in the basement apartment at Martinez's house. On the night of January 4, 2004, she was out dancing and returned around 4 a.m. She went to bed soon afterward. She woke up briefly at 9 a.m. and got up around noon. She asked Alberto Martinez, the victim's brother, if he wanted to share a pizza. He declined and said Martinez was sleeping. She did not hear any gunshots or notice anything unusual about the back door. Alberto Martinez testified that he returned home around 11:30 a.m. on January 4, 2004. He thought Martinez was sleeping. At 6 p.m., he attempted to wake up Martinez, but discovered that he was dead in his bed.

¶ 13 Martinez had been shot several times, including a fatal wound in his head. The police recovered two shell casings from Martinez's bedroom. The condition of the body indicated that it had not been moved. A detective testified that the back door showed signs of forced entry, where the door was split and appeared to have been kicked or punched to open. During the search of Chrzan's car, police found Abukhdeir's identification card. A search warrant was subsequently served on Abukhdeir's residence. In a bedroom, police recovered a .40 caliber Cal Tech gun loaded with live rounds and a box of bullets. Abukhdeir's brother provided a receipt for the gun

and FOID card in his name for the gun. In another bedroom, police found identification for Abukhdeir and a pair of bloodstained jeans.

¶ 14 Forensic evidence presented at trial identified the blood on the jeans as belonging to Abukhdeir. Additionally, the gun recovered from Abukhdeir's residence could not be identified or eliminated as the gun that fired a bullet recovered from Martinez's body. The bullets recovered from Abukhdeir's house had silver casings and the bullet casings recovered from the crime scene were brass.

¶ 15 Following deliberations, the jury found defendant guilty of first degree murder and home invasion. The trial court subsequently sentenced defendant to consecutive terms of 45 years for the murder conviction and 6 years for the home invasion conviction.

¶ 16 On direct appeal, defendant argued that (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting hearsay and the prior consistent statements of several witnesses through a detective; (3) the trial court erred in admitting the gun and ammunition recovered from Abukhdeir's house; (4) the trial court erred in admitting testimony of a shotgun in defendant's possession; (5) the trial court erred in admitting testimony that defendant was arrested outside the Maywood courthouse; and (6) the prosecutor made improper comments during closing arguments. This court affirmed defendant's conviction and sentence. See *Hartsfield*, No. 1-05-2782.

¶ 17 In June 2008, defendant filed his *pro se* postconviction petition in the circuit court, asserting that his trial counsel was ineffective because (1) he usurped defendant's right to testify, and (2) he failed to call Billy Thompson, Amjud Abukhdeir, and Maria Vega as witnesses. He

attached affidavits from himself, his mother and Thompson in support of the petition. In March 2011, defendant, now represented by postconviction counsel, filed an amended postconviction petition, alleging that (1) trial counsel was ineffective for denying defendant his right to testify; (2) trial counsel was ineffective for failing to call Billy Thompson to refute Waszak's trial testimony; and (3) trial and appellate counsel were ineffective for failing to challenge the admission of Richmond's hearsay testimony about Abukhdeir's inculpatory statements.

¶ 18 In August 2011, the State moved to dismiss defendant's amended postconviction petition. In December 2011, the trial court granted the State's motion and dismissed the petition, finding that the claims lacked merit.

¶ 19 This appeal followed.

¶ 20 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2004)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2004); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars

consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 21 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2002).

¶ 22 Defendant raises multiple claims of ineffective assistance of counsel on appeal. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test

to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 23 A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices

concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 24 Defendant first contends that his trial counsel was ineffective by usurping his fundamental constitutional right to testify. A defendant's right to testify at trial is a fundamental constitutional right, as is his or her right to choose not to testify. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997), see *Rock v. Arkansas*, 483 U.S. 44 (1987). It is now generally recognized that the decision whether to testify ultimately rests with the defendant. *Madej*, 177 Ill. 2d at 146. Therefore, it is not one of those matters which is considered a strategic or tactical decision best left to trial counsel. *Madej*, 177 Ill. 2d at 146. Consequently, even though counsel's decision requiring defendant to testify in this case may be explained in terms of trial strategy, it cannot be justified on those grounds. Only the defendant may waive his right to testify. *Madej*, 177 Ill. 2d at 146. However, "[w]hen a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion * * * of his right to testify.' " *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

¶ 25 Defendant attested in his affidavit that he repeatedly informed his trial attorney that he wanted to testify on his own behalf and his attorney told defendant he did not want defendant to testify. Defendant further stated that his attorney spoke with defendant's mother prior to trial to help convince defendant not to testify. Defendant told his mother that he wanted to testify. During trial, defendant was told by his attorney that he would get his chance when the trial judge

asked him if he wanted to testify, but the judge never asked defendant if he wished to testify. When he tried to ask his attorney, his attorney "shushed" him. Defendant also attached an affidavit from his mother that supports defendant's statements regarding his desire to testify at trial.

¶ 26 In a supplemental affidavit, defendant details his potential testimony about the evening of January 3-4, 2004. In his account, he spent the night with Abukhdeir and Chrzan. He received phone calls from Richmond and Kasper around 4:45 a.m., but he did not pick them up. Defendant states that he left Chrzan to sleep in his bedroom in Oak Park and then drove into Chicago. At around 7 a.m., he attempted to reach another girl with whom he was having a sexual relationship, but was unable to get in contact with her. He drove into downtown Chicago, but turned around and returned to his house. He returned home around 8:30 a.m. and went to sleep. Defendant was alone and did not speak with anyone, other than receiving a call from Chrzan after 8 a.m.

¶ 27 Defendant relies on the Second District decision in *People v. Lester*, 261 Ill. App. 3d 1075 (1994), for support. In that case, the defendant alleged in his postconviction petition that when he informed his attorney he wanted to testify at trial, his attorney told him his testimony would hurt his appeal. *Lester*, 261 Ill. App. 3d at 1076. The trial court dismissed the petition, but the reviewing court remanded for an evidentiary hearing. The *Lester* court found that the defendant had made a sufficient allegation of incompetence, noting that "[i]f an evidentiary hearing were to demonstrate that the petitioner's attorney had, indeed, told him prior to trial that he should not testify because that would jeopardize his appeal, such a statement would indicate

that the attorney misled the petitioner by making the assumption that the trial was lost before it began." *Lester*, 261 Ill. App. 3d at 1079-80.

¶ 28 However, more recently the Second District has declined to follow its decision in *Lester*. In *People v. Buchanan*, 403 Ill. App. 3d 600, 606 (2010), the defendant raised a similar argument that his trial counsel was ineffective for advising him not to testify because he would receive a greater sentence and would hurt his appeal. The reviewing court concluded that the defendant failed to make a substantial showing of ineffective assistance of counsel. The court rejected the holding in *Lester* for two reasons: (1) it was not necessarily misleading to advise the defendant that his testimony could hurt his appeal because an attorney is entitled to make an honest assessment of the case; and (2) the *Lester* decision failed to address the prejudice prong of the *Strickland* test. *Buchanan*, 403 Ill. App. 3d at 607-08. The defendant in *Buchanan* failed to make any argument that there was a reasonable probability that the result of the trial would have been different if he had testified and held that the defendant failed to satisfy either prong under *Strickland*. *Buchanan*, 403 Ill. App. 3d at 609.

¶ 29 Here, defendant's affidavit established that defendant knew it was his right and his decision to testify on his own behalf. While the trial court did not admonish defendant, which it was not required to do, defendant was aware of his right and did not assert that right to the trial court. The affidavit showed that trial counsel made a tactical decision to advise defendant not to testify. Defendant asserted in his supplemental affidavit that when he "tried to speak up about" his right to testify, his attorney "kept [him] quiet." There is nothing in the record to reflect any attempt by defendant to speak up and being stopped by his attorney. “In the absence of a

contemporaneous assertion by defendant of his right to testify, the trial court properly rejected this post-conviction claim." *People v. Enis*, 194 Ill. 2d 361, 399-400 (2000).

¶ 30 Further, defendant has not made a substantial showing that there was a reasonable probability that his proposed testimony would result in a different outcome. Defendant contends that his proposed testimony provided "an alternative to the State's circumstantial theory" and would cast the evidence in a different light where there was a reasonable probability of a different outcome. We disagree because defendant's purported testimony that he was driving around Chicago by himself at the time of the murder does not demonstrate a reasonable probability that there would be a different result.

¶ 31 While defendant details his activities for the night, he stated that he was alone at the time of the murder, driving to and from Chicago and Oak Park. The State's case, while circumstantial, was strong. Both Richmond and Kasper placed defendant at Martinez's house with a gun in retaliation for insults made toward Kasper and defendant. Defendant admitted he received phone calls from Richmond and Kasper. They both testified that defendant picked them up around 7 a.m. and drove to Martinez's house. Both women saw a gun in defendant and Abukhdeir's possession. Richmond described the gun as a silver automatic handgun. Richmond testified that after the men returned from Martinez's house, Abukhdeir said he had "blood all over him" and he hoped defendant "did it right." Further, after the homicide, Chrzan testified that defendant made comments to her that if she knew what happened, then she "wouldn't want to come around anymore" and that "if he ever went to jail for murder, he would kill himself." Defendant's account is in contrast to these witnesses and would not affect the jury's verdict. Defendant's

proposed testimony cannot satisfy the prejudice prong under *Strickland*. Accordingly, the trial court properly dismissed this claim of ineffective assistance of counsel.

¶ 32 Next, defendant contends that he made a substantial showing that his trial counsel was ineffective for failing to call William "Billy" Thompson as a witness to contradict Waszak's testimony. At trial, Waszak testified that Abukhdeir gave him a knotted sock on January 6, 2004, which contained a .40 caliber gun barrel and shell casings. Waszak threw the sock and its contents into the Des Plaines River.

¶ 33 Defendant attached an affidavit from Thompson to his amended petition. Thompson testified at Abukhdeir's trial. In his affidavit, Thompson stated that he was on house arrest on January 4-6, 2004, and was not permitted to leave. Waszak did not come to his house on those days because Waszak "is a drug addict and thief and is not welcome." Thompson stated that he was available to testify at defendant's trial.

¶ 34 The decision whether to call particular witnesses is generally a matter of trial strategy, and is left to the trial counsel's discretion. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Such decisions enjoy a strong presumption that they were based on sound trial strategy, and generally, are immune from claims of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 378. In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003).

¶ 35 Defendant asserts that Waszak's testimony provided a "critical link" between a .40 caliber gun and defendant and Abukhdeir. According to defendant, there was no reasonable trial strategy in failing to call Thompson to testify. However, the record shows that trial counsel's strategy was to weaken the impact of Waszak's testimony through cross-examination.

¶ 36 During cross-examination, trial counsel highlighted Waszak's extensive criminal history, including that at the time of his arrest for domestic battery in 2004, he was eligible for an extended term sentence for a pending forgery charge. He faced up to 10 years in prison, but instead received a 4-year term. Trial counsel elicited that Waszak received this sentence after he spoke with the police about this case. Trial counsel used this line of questioning to discredit Waszak's testimony as self-interested. Trial counsel also pointed out that Waszak's statement to police did not state that he opened the sock and saw a gray gun barrel, but he testified that he did this at trial.

¶ 37 Further, trial counsel questioned Waszak about the feasibility of his testimony that he dropped the gun from a bridge on a busy street. Waszak could not recall what day of the week he did this, only that "it was just starting to get dark." Waszak agreed that in January, it would have been around 4 or 5 p.m. if it was getting dark, but he denied that it was rush hour. Counsel also asked questioned Waszak about his drug use. Waszak admitted that he had used cocaine in the last year and that he had stolen money from people to buy cocaine. Counsel asked Waszak about his "KKK" tattoo. Waszak denied that it stood for the Ku Klux Klan, but that it was for "Kings Killing Kings," though Waszak denied any gang membership. Waszak also admitted that he referred to defendant as "N*** Phil."

¶ 38 Trial counsel's cross-examination showed that Waszak was a drug user and had a self-interest in helping the police in this case to receive a shorter sentence in his pending case. According to his affidavit, Thompson would have testified that Waszak was a drug addict and thief, which was admitted during Waszak's cross-examination, and that Waszak was not at Thompson's home when Waszak claimed he received the knotted sock with the gun. Additionally, Thompson's testimony would have included the fact that he was on house arrest, which could have affected his credibility with the jury. Trial counsel's decision not to call Thompson as a witness, but to lessen the impact of Waszak's testimony through cross-examination was a matter of trial strategy. We cannot in hindsight question whether another strategy would have been more effective.

¶ 39 Moreover, defendant cannot show a reasonable probability that the result of the proceedings might have been different. As pointed out above, Thompson's credibility would have been severely questioned based on his house arrest at the relevant time period. The only information which would have been added from Thompson's testimony was his denial that Waszak was at his house between January 4-6, 2004. This testimony does not create a reasonable probability. While defendant points out that Abukhdeir was acquitted, there is no way for this court to know how the separate jury in that case reached its verdict and we will not make assumptions as to their reasoning. Defendant cannot establish how his trial counsel's strategic decision caused him prejudice. Accordingly, the trial court properly dismissed this claim of ineffective assistance of counsel.

¶ 40 Defendant next argues that his trial counsel was ineffective for failing to challenge

portions of Richmond's testimony about inculpatory statements made by Abukhdeir. Defendant specifically complains of Richmond's testimony that after returning to the car from Martinez's house, she heard Abukhdeir say that he had "blood all over him," that he hoped defendant "did it right," and "if it wasn't for [him], [defendant] wouldn't have gotten in the back door." Defendant contends that the statements were inadmissible hearsay and his attorney should have objected to their admission. The State maintains that these statements were properly admissible under multiple grounds.

¶ 41 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). The State asserts that Richmond's testimony about the statements was admissible under the co-conspirator exception to the hearsay rule. "Pursuant to this hearsay exception, any declaration by one coconspirator is admissible against all conspirators where the declaration was made during the pendency of and in furtherance of the conspiracy." *People v. Kliner*, 185 Ill. 2d 81, 141 (1998). However, the co-conspirator hearsay exception does not extend to a statement which is merely a narrative of past occurrences and which does not further any objective of the conspiracy. *Kliner*, 185 Ill. 2d at 141. Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration, as well as statements related to the attempted concealment of the crime. *Kliner*, 185 Ill. 2d at 141.

¶ 42 Here, the comments by Abukhdeir were made immediately following the commission of the murder, which places them proximate in time to the crime. The comment that Abukhdeir hoped defendant "did it right" was part of the conspiracy and involved encouragement and a

concern about escaping punishment for the commission of the crime. Also, we conclude that the comment from Abukhdeir that he had "blood all over him," tied into his aiding in the commission of the offense and a concern about concealment of the crime. We also note that this statement was cumulative to evidence that bloodstained pants were recovered from Abukhdeir's residence and the forensic testing found that the blood belonged to Abukhdeir. These comments were not simply a narrative of the crime, but were directed at a co-conspirator in furtherance of the conspiracy to commit the crime. Finally, Abukhdeir's comment that defendant would not have been able to enter the house without Abukhdeir is somewhat questionable as a statement made in furtherance of the conspiracy. Nonetheless, as we discuss later, defendant cannot establish prejudice under *Strickland*.

¶ 43 Further, Richmond and Kasper were part of the conspiracy, and were the instigators of the crime. They were the ones who contacted defendant after fighting with the men attending the party and returned with defendant and Abukhdeir to seek revenge. Abukhdeir's statements advised Richmond and Kasper, even though Kasper was not listening, about the commission of the crime in furtherance of the conspiracy to get revenge for the fight at the party. Since the comments were made immediately following the commission of the crime and related to the conspiracy to commit the murder, the comments were not inadmissible and any objection by defense counsel would have been futile. "It is axiomatic that a defense counsel will not be deemed ineffective for failing to make a futile objection." *People v. Holmes*, 397 Ill. App. 3d 737, 745 (2010).

¶ 44 Finally, defendant cannot show that there is a reasonable probability that the result of the

trial would have been different if these statements were not admitted. As we have previously noted, the evidence against defendant was strong. Richmond and Kasper's testimony detailed the fight at the party and their subsequent contact of defendant in revenge. Both testified that he picked them up around 7 a.m. and they went to Martinez's house. Richmond stated that she saw a silver gun in defendant's possession when he and Abukhdeir went to Martinez's house and they returned a short time later. Kasper corroborates the timeline of the crime. Further, Chrzan testified that defendant left her alone at his house for a couple hours that morning and her car was nearly out of gas after the night. She also stated that defendant made vague, inculpatory statements. The absence of the statements by Abukhdeir do not establish a reasonable probability that the result of the proceeding would have been different. Accordingly, the trial court properly dismissed this claim of ineffective assistance of trial counsel.

¶ 45 Since we have found that trial counsel was not ineffective for any of the claims raised in the amended postconviction petition, we likewise conclude that any claim of ineffective assistance of appellate counsel lacks merit and was properly dismissed.

¶ 46 Finally, defendant asserts that his postconviction counsel failed to provide a reasonable level of assistance because he abandoned defendant's *pro se* claim that his trial counsel was ineffective for failing to call Abukhdeir's brother to testify about the gun introduced at trial. According to defendant, Abukhdeir's brother would have testified that neither defendant nor Abukhdeir had access to the gun which was kept locked in his room.

¶ 47 "Counsel's duties, pursuant to Rule 651(c), include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the

proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Pendleton*, 223 Ill. 2d at 472; see also Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). However, postconviction counsel is not required to advance frivolous or spurious claims and " 'is only required to investigate and properly present the *petitioner's* claims.' " (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Under Rule 651(c), postconviction counsel is only required "to examine as much of the record 'as is necessary to adequately present and support those constitutional claims raised by the petitioner.' " *Pendleton*, 223 Ill. 2d at 475-76 (quoting *Davis*, 156 Ill. 2d at 164). Postconviction counsel may conduct a more thorough examination of the record and raise additional claims, but he or she is under no obligation to do so. *Pendleton*, 223 Ill. 2d at 476. Further, defendant in postconviction proceedings is only entitled to a "reasonable" level of assistance, which is lower than the standard given under federal or state constitutions. *Pendleton*, 223 Ill. 2d at 472.

¶ 48 Postconviction counsel was not required to raise this claim because the record demonstrates that it lacks merit. The evidence at trial established that the recovered gun belonged to Abukhdeir's brother, who produced a receipt and a FOID card. Further, the shell casings from the gun were silver and the casings recovered from the crime scene were brass. Significantly, the prosecution in closing arguments conceded that the recovered gun was not the murder weapon. First, in closing arguments, the prosecutor stated, "The police never recovered what they considered or really what was confirmed to be the murder weapon in this case." Then, in rebuttal closing arguments, the prosecutor stated, "The relevance of the gun in Mohammed's

house was not that we wanted you to believe that's the murder weapon, the relevance of the gun in Mohammed's house is that they know how to change weapons so as to conceal the crime."

¶ 49 It is clear that the State did not consider the recovered gun to be the murder weapon and conceded that point in closing arguments. The testimony of Abukhdeir's brother that the gun was not accessible to defendant or Abukhdeir was not relevant in light of the State's concession. This testimony was unnecessary and postconviction counsel was not required to raise frivolous or spurious claims. Accordingly, we find that postconviction counsel provided a reasonable level of assistance and fully complied with Rule 651(c).

¶ 50 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 51 Affirmed.